cularly true. Perhaps he was trying to avoid tax but was he guilty of immoral user? There was also some query as to why he should have agreed to pay such a high rent as $800 per month to run a lodging-house at the premises. Mr. Chelliah invited me to draw an adverse inference, from the fact of his willingness to pay this high rent, that he must have been looking forward to running and that he did run a very lucrative business at this address such as running a brothel. It should be remembered, however, that he had received compensation of $25,000 for vacating the Ceylon Road premises where he had also conducted a lodging-house but that this litigation had exhausted his resources. He said that he had about 10 rooms to let at No. 3 Branksome Road for lodgers at $60 per month each and that his family lived with him in some of the other rooms.

After careful consideration I have reached the conclusion that that degree of probability sufficient to prove an allegation of this grave nature has not been established to my satisfaction by the plaintiffs despite a valiant and belated attempt made on behalf of the plaintiffs to show that in August 1968, whilst the case was part-heard, the premises were being used for immoral purposes. A private investigator, P.W.5, watched the premises for 5 days and that investigator seemed satisfied that the place was a brothel according to his standards. He formed that view, after seeing the movements of men and women to and from the premises during those 5 days despite the fact that when, as an agent provocateur, he asked for the services of a prostitute he was rebuffed. He also mentioned a person, whom he called Lulu, who had figured as an adulteress in a divorce case on his own evidence. He said she was a prostitute but that was only his opinion as indeed it was about some of the other women he saw going in and out of the premises. As against this, the defendant said that Lulu was living in the premises with a man called Lim Ing San. Evidence of what took place in August 1968, however strong it may be, which it was not, does not help the plaintiffs' case in proving user for immoral purposes either before or after 27th October, 1965 and until 28th January, 1966 when the writ herein was issued.

What I have to ask myself is the question whether, considering all the evidence, even including, if necessary, that of the defendant and that of his witness (who seemed credible), I am reasonably satisfied that the probabilities are in favour of the plaintiffs, applying the standard I have earlier propounded.

I would make one final observation. The police never since they commenced their raids in 1963 to this date have seen fit to question the defendant at all despite the fact that they conducted numerous raids in 1963-1965 and even in 1968.

With sympathy for the difficult task which the plaintiffs face in cases of this kind I must say that they have not so satisfied me.

The plaintiffs' claim accordingly fails and must, on any view, be dismissed with costs.

*Claim dismissed.*

Solicitors: *Drew & Napier; L.A.J. Smith.*

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## WONG KUP SING v. JERAM RUBBER ESTATES LTD.

[O.C.J. (Raja Azlan Shah J.) March 21, 1969]
[K.L. — Civil Suit No. 68 of 1968]

*Contract — Agreement for sale of land — Time made essence of contract — Reasonable notice of abandonment required — Specific performance.*

The plaintiff claimed specific performance of an agreement of sale of a rubber estate entered into between him and the defendants or in the alternative for damages or rescission of the contract. Under the agreement time had been made the essence of the contract, but at the request of the plaintiff the defendants had consented to extension of time for completion on six separate occasions. Eventually the defendants through their solicitors wrote to the plaintiffs on November 15, 1967, insisting that the purchase be completed on the same day. As completion was not made on that day, they wrote to the plaintiff to say that the agreement was terminated. Subsequently the plaintiff offered to complete the contract but the defendants refused, taking the view that the contract was at an end.

**Held:** (1) once the time for completion was allowed to pass and the parties went on negotiating, then time was no longer of the essence of the contract and the defendants must give reasonable notice of their intention to abandon the contract if the balance is not paid;

(2) in this case the notice of abandonment dated November 15, 1967, was not a reasonable notice and the contract had not been terminated;

(3) in the circumstances the plaintiff had made out a case for specific performance of the contract.

*Cases referred to:—*

(1) *Barclay* v. *Messenger* (1874), 30 L.T.R. 354.

(2) *Kilmer* v. *British Columbia Orchard Lands Ltd.* [1913] A.C. 319, 322.

(3) *Webb* v. *Hughes* (1870), L.R. 10 Eq. 281, 286.

(4) *Stickney* v. *Keeble* [1915] A.C. 386, 423.

(5) *Tilley* v. *Thomas* L.R. 3 Ch. D. 61.

(6) *Ardeshir* v. *Flora Sasson* A.I.R. 1928 P.C. 523.

The following cases were also cited in argument: *Mayson* v. *Clouet* [1924] A.C. 980; *Howe* v. *Smith* (1884), 27 Ch. D. 89; *In re Dagenham Thames Dock Co.* L.R. 6 Ch. D. 1022; *Stockloser* v. *Johnson* [1914] 1 Q.B. 476 at p. 496; *Steedman* v. *Drinkle* [1916] A.C. 276 and *Richards* v. *Oppenheim* [1960] 1 K.B. 616 at p. 622.

CIVIL SUIT.

*W.H. Sault* (*Thara Singh Sidhu* with him) for the plaintiff.

*D.G. Rawson* for the defendant.

*Cur. Adv. Vult.*

**Raja Azlan Shah J.:** The plaintiff claims specific performance of an agreement for sale of a rubber estate totalling 607.5 acres comprised in Lease of State Land No. 1468 for Lot 2813 situate in the Mukim of Sungei Buloh in the District of Kuala Lumpur, alternatively damages for breach of contract and in the further alternative rescission of the contract and payment of sums totalling $650,000.

By the said agreement dated 4th June 1966 the defendants, a limited liability company registered in the United Kingdom with Malayan Estate Agencies Group Limited as their agents (hereinafter referred to as the "defendants' agents") agreed to sell and the plaintiff, a landed proprietor, agreed to buy the said land at the price of $950,000 on the terms and conditions set forth in the agreement.

The plaintiff as was required by clause 1 paid a sum of $95,000 i.e., 10% of the purchase price by way of forfeitable deposit, on or before the execution of the said agreement. The balance of the purchase price was to be paid on 30th November 1966, the date fixed for completion of the purchase (clause 2) and by clause 17, time wherever mentioned was expressly made of the essence of the contract.

At the request of the plaintiff the defendants consented to extension of time for completion on six separate occasions on the following terms and conditions:—

(1) In consideration af a further forfeitable deposit of $95,000 (10% of the purchase price) making a total forfeitable deposit of 20%, the date of completion was extended to 31st January 1967 by an exchange of letters between the plaintiff's then solicitor and the defendants' solicitors dated 25th November 1966 and 1st December 1966 respectively.

(2) In consideration of the payment of a further forfeitable deposit of $10,000 thereby making a total forfeitable deposit of $200,000 the date of completion was extended to 31st March 1967 by an exchange of letters between the plaintiff's then solicitor and the defendants' agents dated 20th February 1967 and 23rd February 1967 respectively.

(3) In consideration of the payment of a further forfeitable deposit of $100,000 thereby making a total forfeitable deposit of $300,000, the date of completion was extended to 15th May 1967 by an exchange of letters between the plaintiff's then solicitor and the defendants' agents dated 31st March 1967 and 2nd May 1967 respectively.

(4) The date of completion was later extended to 30th June 1967 vide the defendants' agents' letter dated 26th May 1967.

(5) The date of completion was further extended to 30th September 1967 by an exchange of letters between the plaintiff's then solicitor and the defendants' agents dated 30th August 1967 and 12th September 1967 respectively.

(6) The date of completion was finally extended to 15th November 1967 by an exchange of letters dated 30th September 1967 and 2nd October 1967 whereby the balance of the purchase price amounting to $650,000 was to be paid by four instalments of $100,000 on 30th September 1967, $100,000 on 13th October 1967, $150,000 on 30th October 1967 and $300,000 on 15th November respectively.

The plaintiff paid the first three instalments amounting to $350,000 by post-dated cheques which were honoured. We now come to the crux of the matter i.e., the final instalment to complete the purchase. This was also by a post dated cheque of the above-stated date. On 13th November 1967 the plaintiff's then solicitor made proposals to the defendants' agents for extension of time up to 31st December 1967 to complete the purchase. The defendants' agents consulted their principals in the United Kingdom and on 15th November 1967 they wrote to the plaintiff's then solicitor informing him that their principals were not willing to grant the plaintiff any further extension of time and insisted that the purchase be completed by noon of that day or the agreement be terminated and his deposits forfeited. On the same day the plaintiff's then solicitor wrote to the defendants' agents proposing a settlement of the final payment by giving the plaintiff time till 31st December 1967 on payment of the normal bank interest till that date or on the date of earlier payment and the defendants taking a mortgage of the said lands for the balance on such term and such rate of interest as shall be mutually agreed upon on the transfer of the property to the plaintiff and further drawing their attention to their letter of 4th July 1967 whereby they had agreed to offer an extension of the date of completion to 31st December 1967 provided the forfeitable deposit was in the sum of $350,000 and the balance of $300,000 to be paid on or before 31st December 1967. It is of significance to note that the said offer was rejected by the plaintiff by their letters of 17th July 1967 and 27th July 1967. The defendants' agents replied on the same day (15th November 1967). They returned the plaintiff's post-dated cheque for $300,000 as the plaintiff had telephoned them asking them not to pay it into their principal's bank account as there were insufficient funds to meet it and added "It is now 12.30 p.m. and as your client has not completed the purchase, we are now treating the agreement as terminated." On 23rd November 1967 the defendants' solicitors by letter refunded the sum of $350,000 (by cheque) being part of the monies received by the defendants to account of the purchase price which is not forfeitable, but

retained the sum of $300,000 being the total of forfeitable deposits paid.

On 11th December 1967 the plaintiff engaged his present solicitors who reviewed the legal position and on 23rd December 1967 they wrote to the defendants' solicitors, *inter alia*:—

"4. On our instructions our client has not banked the $300,000 cheque sent with your letter of the 23rd November, 1967.

5. Under the circumstances we have instructed Mr. W.H. Sault to call upon you on the 29th or 30th to suit your conveniences and to tender a bankers draft for $300,000, being the balance of the purchase price and to return your clients' cheque of $350,000. We request you to produce for his inspection all the relevant title deeds and on being satisfied Mr. Sault will deliver to you the relevant Memorandum of Transfer of the land for your clients' signature and return.

Kindly let us hear from you by return either by express letter or telephone so as to enable our client to purchase the banker's draft and hand it over to Mr. Sault in time."

Mr. Sault did call at the defendants' solicitors' office on 30th December 1967. The letter from the plaintiff's solicitors dated 4th January 1968 confirmed this:—

"We confirm Mr. Sault's call upon you on Saturday 30th ultimo, when your Mr. Barrington Baker informed him that he had instructions to accept the draft for $300,000 without prejudice, and to await instructions from London whether or not they should complete.

xx xx xx xx

3. Mr. Sault stressed that the purchaser did not require further time, upon receiving a letter from you stating that the vendor would complete, the $300,000 would be paid forthwith."

The situation on the 15th November 1967 was the defendants' solicitors considered the agreement was at an end and the discussions which took place between the parties' solicitors constituted a completely new offer to negotiate without prejudice to the defendants' rights under the terms and conditions of the original agreement.

The question to be considered is, was time originally of the essence of the contract? There can be no doubt that it was. I do not know how it could have been more strongly expressed than this: "Clause 17. Time wherever mentioned in this agreement shall be of the essence of the contract." But that had been waived by the conduct of the defendants. The correspondence and dealings beween the parties down to and including 15th November 1967 confirm this view. Time then was no longer of the essence of the contract. If I may recapitulate the words of Sir George Jessel in *Barclay* v. *Messenger*:—[1]

"It appears to me plain that a mere extension of time, and nothing more, is only waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essential character of the time."

In that case the purchases were obliged to pay the balance of the purchase price on 31st July in default all previous payments would be forfeited and the agreement considered null and void. It was submitted on their behalf that the letter of the 16th August written by the vendors to them constituted waiver. The terms of that letter were either commencing works as promised or paying the balance of the purchase money. The purchasers neither commenced works nor paid the money. Sir George Jessel expressed the view that it was a qualified waiver, that is, a waiver if the terms were complied with. In our case it was an extension of time and something more, that is the forfeitable deposit made from time to time was increased to the extent of $300,000 as compared with $95,000 as stipulated in the original agreement. It is also of significance to note that in all the six extensions negotiations were continued after the extended dates fixed for completion and this conduct on the part of the defendants justified the plaintiff in assuming that he would have some indulgence in making his payments: (*Kilmer* v. *British Columbia Orchard Lands Ltd.*[2]). Now two days prior to 15th November 1967 the plaintiff put in new proposals to extend the date to 31st December 1967. That was not acceptable to the defendants who on 15th November 1967 made their final stand and abandoned the contract when the plaintiff failed to pay the balance of the purchase money. There were no doubt further negotiations after 15th November 1967 but they were entered into without prejudice to the defendants' rights under the original agreement.

Once the time for completion was allowed to pass and the parties went on negotiating, then time was no longer of the essence of the contract and the defendants must give a reasonable notice of their intention to abandon the contract if the balance of the purchase money was not paid: (*Webb* v. *Hughes*,[3] *Stickney* v. *Keeble*[4]). If the defendants had on the very day of 30th November 1966 i.e., the original date for completion, made their stand, their decision would have been that time was of the essence and it would have been proper for them to give notice on the day fixed for completion that they would abandon the contract; but after going on negotiating they should have given a reasonable notice: (*Tilley* v. *Thomas*[5]).

In my opinion since time was no longer of the essence, the notice of abandonment dated 15th November 1967 was not a reasonable notice. The net result is that the contract was never terminated and it would follow that the plaintiff was not in default.

Has the plaintiff made out a case for specific performance? I say he has. It must be remembered that the ground upon which a court of equity enforces specific performance of a contract affecting land is that it acts upon the equities arising out of the changed position caused by the acts of the parties done in execution of the contract and not upon the contract itself. The defendants by their indulgence in extending the date for completion on not less than six occasions have lulled the plaintiff into a sense of false security and have justified him in assuming that he would be given reasonable time to complete the contract. It would therefore be inequitable, in view of the dealings which had taken place between the parties, to allow the defendants to enforce his strict legal rights against the plaintiff which he had been led to believe would not be enforced against him. Another factor in his favour is that he has averred and proved a continuous readiness and willingness to perform the contract from the date of the contract to the time of hearing: (*Ardeshir* v. *Flora Sasson* [6]). This is confirmed by the negotiations between the parties down to and including 30th December 1967. Mr. Sault from the Bar did say on the date of hearing that his client was ever ready, and willing to deposit the balance of the purchase money into court on any day specified. In my view this further confirms the plaintiff's continuous readiness and willingness to perform the contract.

In the circumstances I will order specific performance.

*Specific performance ordered.*

Solicitors: *Sault, Keith Sellar & Co.; Shearn, Delamore & Co.*

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## HOME LUCK INVESTMENTS SDN. BERHAD v. COMMISSIONER OF FEDERAL CAPITAL OF KUALA LUMPUR

**[O.C.J. (Raja Azlan Shah J.) March 24, 1969]**
**[K.L.—Originating Motion No. 14 of 1967]**

*Local Authority — Rating — Vacant land — "Improved value" — Caution in applying English precedents in rating law — Town Boards Enactment (Cap. 137), 2, 25, 28, 32 and 44.*

*Statute — Interpretation of words used in — Duty of court.*

This was an appeal against the decision of the Pesuroh Jaya, Ibu Kota, Kuala Lumpur (Commissioner of Federal Capital) confirming the annual value of land belonging to them. The land was vacant land and an application to build 56 flats on it had been refused on the ground that part of the land might be required for a proposed road. The land was assessed on the basis of 10% of the "improved value", that is the capital sum which the land might be expected to realise if offered for sale on such reasonable terms and conditions as a *bona fide* seller would require. The value of the part of the land affected by the proposed road was calculated on a deferred or reduced value. It was argued for the appellant that the English concept of "beneficial ownership" should be applied.

**Held,** dismissing the appeal: (1) there is a fundamental distinction between the English rating law and the local rating law, in that under the local law the rate is borne by the owner, is a first charge on the rateable holding, and is exigible even if there is no occupier and therefore caution must be exercised in depending on the English precedents on rating law for guidance;

(2) in this case the respondent was justified in opting to assess the annual value of the land on 1/10th of the improved value;

(3) in the construction of a statute the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in any gaps disclosed.

*Cases referred to:—*

(1) *Cameron* v. *Mersey Docks* 11 E.R. 1405 at 1429.

(2) *West Bromwich School Board* v. *Overseers of West Bromwich* (1884), 13 Q.B.D. 999.

(3) *London County Council* v. *Churchwardens of Erith* [1893] A.C. 562.

(4) *Port of London Authority* v. *Assessment Committee of Orsett Union* [1920] A.C. 273.

(5) *Kingston Union* v. *Metropolitan Water Board* [1926] A.C. 331.

(6) *Tanggamah Cumarasamy* v. *Chairman Town Council Taiping* [1958] M.L.J. 290.

(7) *Magor* v. *Newport Corporation* [1952] A.C. 189, 191.

(8) *Lee Wah Bank* v. *Commissioner of Federal Capital* [1962] M.L.J. 23, 24.

ORIGINATING MOTION.

*James Puthucheary* (*Alexander Lee* with him) for the appellants.

*Robert K.C. Hoh* (*V.C. George* with him) for the respondent.

*Cur. Adv. Vult.*

**Raja Azlan Shah J.:** This is an appeal by Home Luck Investments Sdn. Berhad against the decision of the Pesuroh Jaya Ibu Kota, Kuala Lumpur, confirming the annual value of the land held under Grant for land No. 1616 for Lot No. 12 Section 67, Town of Kuala Lumpur of $11,060. Tht appeal is directed solely to the question of rateability.

The appellants are a Company incorporated in Malaysia and is the registered proprietor of the said land. The area of the said land is approximately 67,387 sq. feet (about 1½ acres). It is a level piece of land situated at Jalan Horley and suitable for buildings or similar uses. The said land was first assessed at an annual value of $7,400 on the basis of the estimated gross rental of the temporary houses on it. The appellants bought the said land in December 1964 for $429,000 i.e., at $6.37 per sq. foot. The said temporary buildings were demolished in 1965 and as a result the annual